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Malayan Banking Bhd v Ong Chin Yet

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HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24FC-897–09 OF 2023
JAMHIRAH ALI JC
7 JUNE 2024

C

Civil Procedure — Setting aside — Order for sale — Defendant applied to set aside order for sale of charged property on ground application for order was defective — Defendant argued Director-General of Insolvency, and not property owner, should have been named as defendant pursuant to s 83 Insolvency Act 1967 ('Act') because of defendant's bankruptcy — Whether argument had no merit — Whether chargee was exercising statutory right to sell the property pursuant to s 256 National Land Code 1965 and thereby operated outside the defendant's bankruptcy — Whether s 83 did not override s 8(2) of Act

D

The defendant had charged a property to the plaintiff to secure the grant of two loans. About nine years later, he was adjudged a bankrupt. Since the defendant defaulted in his obligations to service the loan as contracted, the plaintiff recalled and terminated the loan facilities and, inter alia, took steps to obtain an order for sale of the charged property. All cause papers were served on the defendant and the Director-General of Insolvency ('DGI'). On the day of the hearing, the plaintiff obtained an order for sale of the property without contest from any party. Subsequently, the defendant applied to set aside the order for sale on the ground that it was irregular for the reason the application to obtain the order wrongly named Ong Chin Yet, and not the DGI, as defendant. The defendant argued that this mistake breached s 83 of the Insolvency Act 1967.

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Held, dismissing the application:

(1) The defendant's application had no merit. As the secured creditor, the plaintiff had the first right to the property which did not become divisible among the defendant's creditors nor did it vest in the DGI upon the defendant's bankruptcy (see paras 16–18).

H

(2) In a foreclosure proceeding, the chargee was seeking an order for sale to enforce its statutory right to do so vis a vis the charged property pursuant to s 256 of the National Land Code ('NLC'). It was not a suit for recovery of a debt owed by the defendant (see paras 20 & 29).

I

(3) Section 83 of the Insolvency Act ('the Act') did not apply as the plaintiff initiated the action to realise its security under the terms of the charge. The plaintiff's rights were safeguarded under s 8(2) of the Act which

permitted it to operate independently of the bankruptcy proceedings and manage the property as it deemed fit. The plaintiff had opted to stand outside the defendant's bankruptcy when it initiated the foreclosure proceedings. Consequently, the action was correctly brought against the defendant without the need to name the DGI as the defendant. Based on the authorities, s 83 did not supersede s 8(2) of the Act (see paras 24–25).

(4) In the present case, the Form 16D notice of default under s 254 of the NLC and all necessary cause papers in the foreclosure proceedings were properly served on both the defendant and the DGI. There was no statutory breach in this case to warrant a setting aside of the order for sale (see paras 30–31 & 34).

[Bahasa Malaysia summary

Defendan telah menggadaikan harta kepada plaintif untuk mendapatkan pemberian dua pinjaman. Kira-kira sembilan tahun kemudian, dia diputuskan bankrap. Memandangkan defendan ingkar dalam tanggungjawabnya untuk membayar pinjaman seperti yang dikontrakkan, plaintif menarik balik dan menamatkan kemudahan pinjaman dan, antara lain, mengambil langkah untuk mendapatkan perintah penjualan harta yang digadai. Semua kertas kausa telah diserahkan kepada defendan dan Ketua Pengarah Insolvensi ('DGI'). Pada hari perbicaraan, plaintif mendapat perintah penjualan harta tersebut tanpa tuntutan daripada mana-mana pihak. Selepas itu, defendan memohon untuk mengenepikan perintah jualan atas alasan ia tidak teratur atas alasan permohonan untuk mendapatkan perintah itu tersilap menamakan Ong Chin Yet, dan bukannya DGI, sebagai defendan. Defendan berhujah bahawa kesilapan ini melanggar s 83 Akta Insolvensi 1967.

Diputuskan, menolak permohonan:

(1) Permohonan defendan tidak mempunyai merit. Sebagai pemiutang bercagar, plaintif mempunyai hak pertama ke atas harta yang tidak boleh dibahagikan di kalangan pemiutang defendan dan tidak terletak pada DGI atas kebankrapan defendan (lihat perenggan 16–18).

(2) Dalam prosiding penjualan, pemegang gadaian sedang mendapatkan perintah jualan untuk menguatkuasakan hak berkanunnya untuk berbuat demikian terhadap harta yang digadai menurut s 256 Kanun Tanah Negara ('KTN'). Ia bukan saman untuk mendapatkan semula hutang yang terhutang oleh defendan (lihat perenggan 20 & 29).

(3) Seksyen 83 Akta Insolvensi ('Akta') tidak terpakai kerana plaintif memulakan tindakan untuk merealisasikan cagarannya di bawah terma gadaian. Hak plaintif dilindungi di bawah s 8(2) Akta tersebut yang membenarkannya beroperasi secara bebas daripada prosiding kebankrapan dan menguruskan harta itu sebagaimana yang difikirkan

sesuai. Plaintif telah memilih untuk berdiri di luar kebankrapan defendan apabila ia memulakan prosiding penjualan. Akibatnya, tindakan itu telah dibuat dengan betul terhadap defendan tanpa perlu menamakan DGI sebagai defendan. Berdasarkan otoriti, s 83 tidak menggantikan s 8(2) Akta tersebut (lihat perenggan 24–25).

(4) Dalam kes semasa, notis keingkaran Borang 16D di bawah s 254 KTN dan semua kertas kausa yang perlu dalam prosiding penjualan telah disampaikan dengan sewajarnya kepada defendan dan DGI. Tiada pelanggaran undang-undang dalam kes ini untuk menjamin perintah penjualan diketepikan (lihat perenggan 30–31 & 34).]

Cases referred to

Ambank (M) Berhad v CA Steel Sdn Bhd [2012] MLJU 421, HC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Hap Seng Credit Sdn Bhd v Rentak Arena (M) Sdn Bhd [2017] 9 MLJ 169, HC (refd)
Hia Choo Nai v OCBC Bank (Malaysia) Berhad [2019] MLJU 1900, HC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)
Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal [2013] 3 MLJ 61, CA (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)
Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency) [2015] 2 MLJ 353 (folld)
Malayan Banking Bhd v The Official Assignee [1993] MLJU 416, HC (refd)

Legislation referred to

Insolvency Act 1967 ss 8(2), 73(1)(a), 83
National Land Code ss 254, 256, 256(3), Form 16D
Rules of Court 2012 O 42 r 13, O 32 r 6, O 92 r 4

Ashmadi Othman (with Luqman Abdul Haris) (Zulpadli & Edham) for the plaintiff.
K Swathi Shankri (YS Woo & Proctor) for the defendant.

Jamhirah Ali JC:

INTRODUCTION

[1] In an application dated 29 November 2023, the defendant sought to set aside the order for sale issued on 30 October 2023, as outlined in encl 11.

A **[2]** The defendant sought to set aside the order for sale on the grounds that it was obtained irregularly due to the plaintiff's failure to comply with s 83 of the Insolvency Act 1967. Therefore, the order for sale is null and void ex debito justitiae.

B BRIEF FACTS

[3] The plaintiff granted two loans, namely the MPLS-MAXI facility loan and an overdraft facility loan (referred to collectively as 'the loan facilities'), to the defendant for the purpose of acquiring a property. The property, identified as Geran 46415, Lot 6954, Mukim Klang, Daerah Klang, Negeri Selangor ('the said property'), was charged to the plaintiff as collateral. The charge on the said property was officially registered on 6 June 2007 under Perserahan No 43828/2007.

D **[4]** The defendant was adjudged bankrupt on 17 February 2016.

[5] On 13 January 2023, the plaintiff issued a notice of recall to terminate and/or recall the loan facilities to the defendant and the Director General of E Insolvency (DGI).

[6] Subsequently, as the defendant continued to fail to repay the full outstanding amount following the termination of the loan facilities, the plaintiff issued a statutory notice Form 16D against the defendant on F 8 February 2023.

[7] Following the expiration of 30 days from the issuance of Statutory Notice Form 16D, the plaintiff filed an originating summons in encl 1 (OS) on G 14 September 2023 in this court. The plaintiff initiated foreclosure proceedings against the defendant following the defendant's failure to pay the outstanding debt under the said loan facilities.

[8] The hearing of the OS was fixed on 30 October 2023. All relevant cause H papers were served on the defendant and the DGI.

[9] At the hearing on 30 October 2023, neither the defendant nor their solicitor attended. However, in a letter dated 26 October 2023, the DGI informed the plaintiff of its non-objection to the plaintiff's application for an I order for sale.

[10] Therefore, an order for sale was recorded on 30 October 2023 in this court.

[11] However, after obtaining sanction from the DGI on 24 November 2023, the defendant filed an application in encl 11 on 29 November 2023. This application sought to strike out the plaintiff's OS and to set aside the order for sale dated 30 October 2023, invoking O 42 r 13, O 32 r 6 and O 92 r 4 of the Rules of Court 2012.

[12] After considering encl 11, I dismissed the defendant's application, leading to this appeal.

FINDINGS OF THE COURT

[13] The defendant's application rested on a single ground. They argued that the plaintiff's OS was flawed, irregular, and void because the plaintiff failed to designate the DGI as the defendant under s 83 of the Insolvency Act 1967, opting instead to name Ong Chin Yet as the defendant.

[14] The defendant contended that s 83 of the Insolvency Act 1967 explicitly mandates that any legal action against a bankrupt must be initiated using the official name 'The Director General of Insolvency of the property ..., bankrupt,' followed by the name of the bankrupt. Since the plaintiff failed to adhere to this requirement, the order for sale should be set aside as a matter of right. Consequently, at this juncture, the defendant is not obliged to present or substantiate any cause to the contrary under s 256(3) of the National Land Code ('the NLC'). Furthermore, if the court nullifies the order for sale due to non-compliance with s 83 of the Insolvency Act, the plaintiff must subsequently withdraw the originating summons and file afresh.

[15] Section 83 of the Insolvency Act states as follows:

> 83 Official Name
>
> Official name of Director General of Insolvency
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> The Director General of Insolvency may sue and be sued by the official name of 'The Director General of Insolvency of the property of ..., bankrupt,' inserting the name of the bankrupt, or in a case under section 122 by the official name of 'The Director General of Insolvency of the property of ... a deceased insolvent', inserting the name of the deceased, and by such name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

[16] This court finds that the defendant's argument is unfounded.

[17] Apart from merely stating his grounds to set aside the order for sale, the

A defendant's submission was scanty and devoid of authority and substance to substantiate his contention.

[18] The plaintiff, being the secured creditor of the said property has the first right to the said property. The said property being charged to the plaintiff does not become divisible among the defendant's creditors and it does not vest on the DGI upon the defendant's bankruptcy order. Section 8(2) of the Insolvency Act 1967 states as follows:

> (1) On the making of a bankruptcy order —
>
> (a) except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose; and
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> (b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.
>
> (2) *This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed-nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act, 1955 [Act 265] of the States of Peninsular Malaysia or any corresponding provisions in Sabah and Sarawak.*
>
> (3) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a bankruptcy order if he does not realize his security within twelve months from the date of the bankruptcy order. (Emphasis added.)

[19] Therefore, the plaintiff has a right to deal with the said property held as a security for the loan facilities provided by the plaintiff to the defendant.

[20] In a foreclosure proceedings the plaintiff is seeking an order of the court to enforce the statutory right and remedy against the charge. The plaintiff was not suing for the debt owed by the defendant.

[21] In the case of *Ambank (M) Berhad v CA Steel Sdn Bhd* [2012] MLJU 421, the court held:

> ...
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> In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 199, the Supreme Court said at p 122:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising bis statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject n...

...

In *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95, Ong CJ (Malaya) said at p 9:

> 'The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest.

In *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257, the Supreme Court in following the decision in *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* said at p 258:

> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.
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> We are in complete agreement with the law as expounded by the learned Chief Justice of the High Court of Malaya. (*American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95).

In *Sharfuzzaman and others v H Hunter, Liquidator of Upper India, Ltd, and another* AIR (1930) Oudh 20 the court said at p 29:

> A secured creditor who has advantage of security may remain outside the Act. He can realize on his security. To the extent to which he realizes on his security will reduce the estate of insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should, however, the amount of realization be less than the amount due to him he is given the special privilege of proving for the balance. This balance is difference between the amount owing and the amount realized. When he has proved he will not obtain anymore than his proportionate share in the estate. He will be put then on the footing of an unsecured creditor.

[22] The plaintiff, being a secured creditor has an option to elect under bankruptcy law and take the position to stand outside the bankruptcy of the defendant. As a secured creditor, the plaintiff is entitled to deal with the said

property in any manner as it thought fit. In the case of *Hia Choo Nai v OCBC Bank (Malaysia) Berhad* [2019] MLJU 1900, the learned High Court judge explained:

> [26] The plaintiff's counsel did not submit any case law on sub-s 8(2) Act 360. Nonetheless, there are a series of cases which have elucidated on this provision. In *Janegi House Sdn Bhd lwn CIMB Bank Bhd* [2013] 8 MLJ 665; [2013] 2 CLJ 804, Abdul Karim Jalil JC (now JCA) at pp 677–678 (MLJ); pp 817–818 (CLJ) held that:
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> > [20] Seksyen ini memberi kuasa dan pilihan kepada mana-mana pemiutang bercagar (lihat takrifan di s 2), sama ada menguatkuasakan sekuriti mereka di luar prosiding kebankrapan atau sebaliknya (lihat juga Jadual C). Jika di luar prosiding kebankrapan, pemiutang bercagar boleh menjual atau urus janji (*deal*) sekuriti itu secara mana yang dia berhak lakukan. Dalam kes *Sunder Lal and Anor v Benarsi Dass and Ors* [1939] All ER 401 telah menjelaskan ungapan 'to realize or otherwise deal with his security' begini:
> >
> > Now the words used in this sub-section are 'to realize or otherwise deal with his security.' The words 'realize his security' are no doubt applicable to proceeds by auction sale ... In our opinion, the words 'otherwise deal with his security' do cover the application of the decree-holder under O 34, r 6 and a secured creditor is entitled by this section to obtain a decree under O 34 r 6 and to deal with the security by the method allowed by that Rule.
> >
> > [21] Dalam kes rayuan ini perayu amat sedar bahawa perjanjian jual beli yang dimasuki dengan Teo melibatkan hartanah yang bercagar dengan responden. Berlandaskan kepada s 8(2) dan kes Sunder Lal di atas, responden boleh, jika mahu menguatkuasakan sekuriti tersebut, mengambil tindakan berdasar surat cara sekuriti itu sama ada secara lelongan ataupun melalui penjualan secara triti persendirian, jika dibenarkan oleh surat cara sekuriti, Kanun Tanah Negara atau Kaedah-Kaedah Mahkamah 2012. Memandangkan Teo telah diketahui seorang bankrap dan segala hal ehwal pentadbiran estetnya diuruskan oleh Ketua Pengarah Insolvensi, dan selaras juga dengan kehendak s 55(5), khususnya, adalah tidak salah bagi responden memerlukan kebenaran Ketua Pengarah Insolvensi sebelum mempertimbangkan untuk menjalankan kuasanya untuk urus janji (deal) dengan sekuriti berkenaan ...
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> [27] The Court of Appeal in *Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency)* [2015] 2 MLJ 353 had considered the provisions in Schedule C of the Bankruptcy Act 1967 and the proof of debt filed by the appellant bank and at p 359 said:
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> > [14] We have considered the provisions in Schedule C of the Act, and the exact terms of the POD filed which appears on pp 177–182 of the appeal record, Vol 2. We have further considered the elucidation of paras 9–17 of Schedule C of the Act in *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt)* [1993] 2 AMR 3400, as followed in *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201.

[15] In summary, a secured creditor has three 'elections' under bankruptcy law:

(1) *it can stand outside the bankruptcy, and realise its security* (see para 9);

(2) it can value its security and prove for the difference between this value and the amount of its debt (see para 11); or

(3) it can surrender its security to the DGI for the general benefit of the creditors (see para 10).

[28] The aforementioned three elections available to a secured creditor was also alluded to in the judgment by S Nantha Balan (now JCA) in *Diamex Sdn Bhd v Ivory Indah Sdn Bhd & Ors* [2017] 9 MLJ 257, where His Lordship at pp 276–277 held the following:

[53] *It is clear that by virtue of s 8(2) of the BA 1967, the secured creditor (MAA at that time) was free to deal with the land in any manner they wished* and they had the option of either relying on their security and standing outside of the bankruptcy or they could surrender their security for the general benefit of the creditors and participate in the distribution of the assets together with all other creditors. The choice is theirs. The position of a secured creditor in terms of their options is clearly illustrated in the following cases:

(a) *Malayan Banking Bhd v The Official Assignee* [1993] MLJU 416; [1993] 1 LNS 294 at p 3; and

(b) *Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency)* [2015] 2 MLJ 353 at p 359 (CA).

[29] In view of the pronouncements in the authorities as quoted above, the plaintiff is certainly not wrong in submitting that the said property stood outside the bankruptcy of the defendant and pursuant to sub-s 8(2) Act 360, the plaintiff, as a secured creditor, is entitled to deal with the said property in any manner as it thought fit. Hence, Ms Faten implored that the auction proceed on the date as fixed by the DR. (Emphasis added.)

[23] Additionally, the case of *Malayan Banking Bhd v The Official Assignee* [1993] MLJU 416, is on point. In the said case, Abdul Kadir Sulaiman J (as His Lordship was then) held that the official assignee (as it was formerly known) should not be made a party to proceedings filed to realise the security, based on the provisions of s 8(2) of the Bankruptcy Act 1967 (as it was formerly known). This is because, under section 8(2) of the Insolvency Act 1967, the secured creditor has the option to realise the security independently of the bankruptcy. The relevant portion of the decision states:

1 ... *The summons named the Official Assignee as receivers of the estate of the bankrupt, as the defendant.* The summons of the plaintiff came for disposal before the court on the 22nd day of July 1993. Before the hearing commenced, the Official Assignee raised an objection. *The Official Assignee wanted the plaintiff to proceed against the bankrupt direct without the involvement of his office in the light of s 8(2) of the Bankruptcy Act, 1967* ('the Act'). The learned counsel for the plaintiff replied that it

was done in the manner in view of O 15 r 7 of the Rules of the High Court 1980 ('the RHC') which requires the bankrupt to be represented by the Official Assignee as receivers of his estate. In Chambers, I ruled that in the light of the express provisions of s 8(2) of the Act, the plaintiff as a secured creditor can proceed with the bankrupt in the usual manner as if he is not a bankrupt for purpose of application for an order for sale of the secured property under s 148(2)(c) of the Code. Not satisfied with the ruling, the plaintiff applied for further argument in Open Court pursuant to O 56 r 2(2) of the RHC.

2. Section 8(2) of the Act in as far as is relevant to this proceedings states as follows:

> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed ...

The provision is very clear. But the learned counsel for the plaintiff contends that the Act does not provide any procedure upon which the chargee can so proceed to realize the security. Furthermore, she submitted, this court is not sitting in bankruptcy and therefore the bankruptcy rules do not apply. Since this court is sitting in exercise of its civil jurisdiction, the appropriate rules to follow is the RHC. Since the debtor is a bankrupt, the Official Assignee is the trustee of the debtor's estate. Consequently O 15 r 14 of the RHC would apply. It is to be noted that in this further argument, the learned counsel brought in r 14 as well in support.

3. Dealing first with the procedure which the learned counsel for the plaintiff complained that there is none in the Act for the secured creditor to proceed against a bankrupt to realize the security. *The answer is stated in s 8(2) of the Act itself, ie a secured creditor may proceed in the same manner as if the debtor is not a bankrupt. Section 8(2) preserves all his rights against the debtor. In the case of White v Simmons, LR 6 Ch. 555 at page 558 Lord Hatherley LC described section 12 of the Bankruptcy Act 1869 which is substantially the same as section 8(2) of the Act as 'an express reservation of all right.'* In other words, as stated by Thomson J in *Chinese Tin Mines Rehabilitation Loans Board v Official Assignee, FM* [1957] 23 MLJ 65 at p 67:

> *... the mere fact of the debtor's bankruptcy did not deprive the creditor of his contractual rights nor did it affect his right to satisfy himself in respect of them out of the proceeds of his security.*

4. On the issue that the bankruptcy rules do not apply, it is true that we are here not dealing with any matter in a bankruptcy proceedings but matters in regard to the realization of the security of a secured creditor in respect of that property which since the execution of the charge, the debtor has become a bankrupt. *In ordinary case, had the debtor not been a bankrupt, the remedy given to the secured creditor is as provided in s 148 of the Code. Now that the debtor is an undischarged bankrupt, the Act governs him. The Act, however, by s 8(2) preserves this right of the secured creditor in relation to the secured property belonging to someone who is now a bankrupt.* It is to that extent that the Act is resorted to. But do the RHC or the Code in any way in conflict with s 8(2) of the Act? I do not think so. First let us look at O 15 of the RHC. The rules which are of relevance concerning bankrupt are rr 7 and 14.

5. Order 15 r 7 of the RHC concerns the changes of parties by reason of death or bankruptcy. It is of general application which relates to all causes of action which

would survive or continue even though death or bankruptcy has occurred to the parties before the determination of the action. However, the action does not survive automatically. Under this rule, certain steps have to be taken to continue with the proceedings, otherwise the action would have been abated or defective: *Eldridge v Burgess* 7 Ch D 411; *Re Shephard* 43 Ch D 136. In the present case, this Originating Summons of the plaintiff to realise its security commenced after the bankrupt has become so and not before. In the circumstances, r 7 does not apply at all. So, if by her submission, the learned counsel for the plaintiff meant that O 15 r 7 governs this present proceedings, then it has no merit at all.

6. No doubt it is true that the Official Assignee is a trustee in bankruptcy of the bankrupt. So the learned counsel says O 15 r 14 of the RHC would apply. Rule 14(1) states:

> Any proceedings, including proceedings to enforce a security by foreclosure or otherwise, may be brought by or against trustees, executors or administrators in their capacity as such without joining any of the persons having a beneficial interest in the trust or estate, as the case may be; and any judgment or order given or made in those proceedings shall be binding on those persons unless the court in the same or other proceedings otherwise orders on the ground that the trustees, executors or administrators, as the case may be, could not or did not in fact represent the interest of those persons in the first-mentioned proceedings.

The plaintiff may be right if the proceedings is instituted against the Official Assignee as trustee for the estate of the bankrupt, but in this case the Official Assignee is cited not as trustee in compliance with O 15 r 14(1) of the RHC but as 'Receivers of the estate' of the bankrupt. To that extent, r 14 does not apply. In any event, para (2) of the said rule gives the discretion to the court to order the person having the beneficial interest to be made a party to the proceedings. *In the light of the express provisions of s 8(2) and Schedule C of the Act, and the authorities, there is no reason for the court to refuse to exercise the discretion and it is a proper one to do so in the circumstances.*

7. *Paragraphs 9 to 17 of Schedule C to the Act concern the proof of debts by secured creditors like the plaintiff. Paragraph 9 allows a secured creditor to realize the security given by the debtor before his bankrupt. This is in consonant with s 8(2) of the Act. Paragraph 10 allows a secured creditor to surrender his security to the Official Assignee for the general benefit of the creditors. Paragraph 11 allows a secured creditor to value his security and prove for the difference between the value and the amount of his debt. What can be implied from these paragraphs is that there would be another alternative to be chosen by a secured creditor in respect of the security ie he may rely on his security and stand aside from the bankruptcy proceedings altogether. So, with these four choices given to a secured creditor by the law, it is for him to choose any one of them in regard to the security.* In *Chinese Tin Mines Rehabilitation Loans Board*'s case, Thomson J has this to say at p 66:

> *As was pointed out by Jessel, MR in the case of Moor v Anglo-Italian Bank 10 Ch D 681 whether the creditor stands aside or comes in and proves is a case of election and does not involve any forfeiture of his rights. The creditors has 'two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security'.*

At p 67, His Lordship went further to state:

> *It all comes back to a question of election. The creditor can come in or he can stay out. If he comes in he must submit to his debt being dealt with in accordance with the bankruptcy law which says in effect that only so much of it can count as against the other creditors. If he stays out he can do anything that the law allows him to do with his security as if there had been no question of bankruptcy. He can realise it or he can retain it.*

8. In *Re Say Tee; Official Assignee, FM v Manmohan Singh* [1954] 1 MLJ 177, a secured creditor commenced a suit against the Official Assignee as the legal representative of the estate of a bankrupt. The suit concludes with a prayer for payment of the debt and in default of payment, sale. By a notice of motion, the Official Assignee sought for directions as to whether the Plaint in the suit can be treated as a motion in bankruptcy or whether such Plaint should be struck out, and the plaintiff allowed to proceed by way of motion or originating summons in respect of his right of sale. His Lordship made no order on the Official Assignee's motion as what concerned the court is the question of whether the creditor is entitled to proceed outside the bankruptcy and independently of it. His Lordship answer the question in the affirmative. Further, at p 178 he said:

> *Once it is conceded that the creditor is a secured creditor his rights are governed by section 9(ii) of the Bankruptcy Enactment.*

Section 9(ii) of the Enactment is in pari materia with the present s 8(2) of the Act.

9. *In the present proceedings it is clear from the application made pursuant to s 148 of the Code for the sale of the secured property that the plaintiff wants to realise its security, in which case it would not be precluded from proving for any balance due should the amount realised is not sufficient to meet the debt due from the bankrupt pursuant to para 9 of Schedule C to the Act. Its choice is, therefore, to realise its security.* The Official Assignee was made the defendant only for the reason of O 15 of the RHC as contended by the learned counsel. For the reason I have stated above, the Official Assignee should not be made a party to the proceedings of this nature in the light of the provisions of s 8(2) of the Act. (Emphasis added.)

[24] Applying the same analogy to the present case, this court concludes that s 83 of the Insolvency Act does not apply, as the plaintiff initiated the action under the OS to realize its security interest held under the charge. The plaintiff's rights are safeguarded under s 8(2) of the Act, permitting the plaintiff to operate independently of the bankruptcy proceedings and manage the property as deemed appropriate. In this case, the plaintiff had opted to stand outside the defendant's bankruptcy when the plaintiff initiated the foreclosure proceedings. Consequently, the action was correctly brought against the defendant without the necessity of naming the DGI.

[25] The defendant argued that s 8(2) does not supersede s 83 of the Insolvency Act 1967. However, the defendant did not present any case law or authority to substantiate this argument. Based on the authorities cited above, it

is my considered view that s 83 of the Insolvency Act 1967 does not supersede s 8(2) of the Act .

[26] Moreover, the foreclosure proceedings initiated by the plaintiff against the defendant and the order for sale against the bankrupt defendant, constitute an 'action in rem' rather than an 'action in personam'. This was established by the Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119:

> ... A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code *does not commence an action*. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. (Emphasis added.)

[27] The same was also confirmed in the Court of Appeal in the case of *Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61 held as follows:

> [18] The court is of the view that unlike a civil claim for the recovery of damages arising from a breach of contract which is a suit in personam, a common law action, *a foreclosure action is an action in rem being a statutory action under the NLC* ... (Emphasis added.)

[28] Additionally, in the case of *Hap Seng Credit Sdn Bhd v Rentak Arena (M) Sdn Bhd* [2017] 9 MLJ 169, the court held:

> Action in rem not personam
>
> [10] This court say most of these issues (all these issues will be discussed in a short while) raised by the defendant are irrelevant *because the order for sale is an action in rem. It is not an action in personam. It is against the land or property itself and more so when the charge has been duly registered. It is a based on statutory provision ie s 256(3) of the NLC for order of sale.* The issues raised in respect of the moneylending transaction between the plaintiff and the defendant is however at best only an action in personam. It does not relate to the plaintiff's right in rem in foreclosing the property itself. (Emphasis added.)

[29] Therefore, the plaintiff initiated foreclosure proceedings against the defendant's property in line with s 256 of the NLC, exercising their rights as the secured creditor.

[30] Moreover, in this case, all the necessary cause papers have been properly served on both the DGI and the defendant. The plaintiff has obtained a letter of no objection from the DGI, who is the receiver of the defendant's bankruptcy estate as provided in s 73(1)(a) of the Insolvency Act 1967.

[31] The plaintiff had also issued a valid and lawful statutory notice Form 16D pursuant to s 254 of the NLC to both the DGI and the defendant.

[32] It is also undisputed that the defendant obtained a sanction on 24 November 2023, after the order for sale was granted on 30 October 2023.

[33] Furthermore, this court holds the considered view that once the order for sale has been granted, it is functus officio (*Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121). An order that was regularly obtained can only be set aside if, among other reasons, it is grounded on fraud, made in breach of statute, or issued without jurisdiction, and may therefore be declared void and set aside in proceedings brought for that purpose (*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).

[34] Having reviewed the cause papers, I find no statutory breach in this case and I find no valid reason to set aside the order for sale granted by this court on 30 October 2023. It is evident that the court is functus officio.

[35] For the reasons stated above, I, therefore, ordered that the defendant's application in encl 11 be dismissed with costs of RM8,000.

Application dismissed.

Reported by Ashok Kumar